COURT OF APPEALS
DECISION
DATED AND RELEASED

March 5, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-1273

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN ex rel.
CLAY RICH,

Petitioner-Appellant,

v.

KENNETH MORGAN, WARDEN,
RACINE CORRECTIONAL INSTITUTION,

Respondent-Respondent.

APPEAL from an order of the circuit court for Racine County: DENNIS J. FLYNN, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Snyder, P.J., Brown and Anderson, JJ.

PER CURIAM. Clay Rich has appealed from a trial court order dismissing his petition for a writ of certiorari and affirming a prison disciplinary committee's decision finding him guilty of the following offenses: (1) inadequate work standards in violation of WIS. ADM. CODE § DOC 303.62; (2) lack of punctuality and attendance in violation of WIS. ADM. CODE § DOC 303.49; (3) being in an unassigned area in violation of WIS. ADM. CODE § DOC 303.511; and (4) disobeying orders in violation of WIS. ADM. CODE § DOC

303.24. As a result of the findings, Rich was given six days of adjustment segregation and sixty days of program segregation.[1]

We reverse the portion of the trial court's order affirming the finding that Rich violated WIS. ADM. CODE § DOC 303.511 and direct that the matter be remanded to the disciplinary committee with directions to set aside this finding of guilt and to reconsider the penalty imposed in light of the reversal. We affirm the portion of the trial court's order upholding the remainder of the committee's decision.

On appeal of a trial court order sustaining a prison disciplinary decision, we review the decision of the disciplinary committee independently of the trial court. *See* ***State ex rel. Whiting v. Kolb***, 158 Wis.2d 226, 233, 461 N.W.2d 816, 819 (Ct. App. 1990). Our review of the committee's decision is limited to the record created before the committee. *See* ***id.*** We determine: (1) whether the committee stayed within its jurisdiction; (2) whether it acted according to law; (3) whether its decision was arbitrary, oppressive or unreasonable and represented its will rather than its judgment; and (4) whether the evidence was such that it might reasonably make the decision it did. *See* ***id.***

Rich's first contention is that he was denied his right to present witnesses on his behalf when his request for appearances by three correctional officers was not honored. He contends that they would have presented relevant testimony, and that his request for their appearance could not be denied absent a declaration of unavailability as required by WIS. ADM. CODE § DOC 303.81(4).

Confrontation and cross-examination are not due process requirements at a prison disciplinary hearing. *See* ***Wolff v. McDonnell***, 418 U.S. 539, 568 (1974). Moreover, while WIS. ADM. CODE § DOC 303.81 permits the appearance of witnesses on an inmate's behalf, it provides that "[e]xcept for good cause, an inmate may present no more than 2 witnesses in addition to the reporting staff member or members." *See* WIS. ADM. CODE § DOC 303.81(1). WISCONSIN ADM. CODE § DOC 303.81(2) further provides that after an

[1] The disciplinary committee initially gave Rich ninety days of program segregation. The penalty was reduced to sixty days by the prison warden on appeal.

investigation to determine whether witnesses requested by an inmate shall be called, the "hearing officer may only call witnesses who possess relevant evidence."

Two of the five witnesses whose attendance was requested by Rich testified at the hearing. The two who testified were other inmates. While Rich contends that the testimony of the correctional officers would have been deemed more credible than that of the inmates, nothing in the record establishes that good cause existed to exceed the two-witness limit.

Rich's advocate interviewed the three correctional officers and presented their statements at the hearing. Officer Melcher's statement directly corroborated Rich's testimony that he allowed Rich to walk through an unassigned area. Because his statement confirmed Rich's contention, his actual appearance was unnecessary and did not establish good cause for exceeding the two-witness limit. *See* ***State ex rel. Meeks v. Gagnon***, 95 Wis.2d 115, 127, 289 N.W.2d 357, 364 (Ct. App. 1980).

The statements given to the advocate by the other two correctional officers, Ivy and Marshall, established that they had no relevant evidence to offer at the hearing. Ivy indicated that he did not recall the incident underlying the charges. While Rich argues that further questioning might have jogged Ivy's memory, this is pure speculation. Since nothing in the record indicates that Ivy had any relevant evidence to offer, no basis exists to conclude that Rich's rights were violated when his request for Ivy's appearance was not granted.

Similarly, no basis exists to conclude that Marshall had any relevant testimony to offer. Marshall indicated that he was not present on the day of the incident. While Rich argues that Marshall would have testified that Rich was a good worker, Marshall could not have testified regarding Rich's work performance or punctuality on the day the conduct report was issued.

Since the charges against Rich related only to his conduct on that date, good cause did not exist to compel Marshall's testimony.[2]

Rich's second argument is that his advocate made a statement at the hearing which was contrary to his interests, and therefore did not adequately assist him. Initially, we point out to Rich that there is no right to counsel, either retained or appointed, in disciplinary proceedings. *See* ***Wolff***, 418 U.S. at 570. While Department of Corrections rules provide for the appointment of an advocate, the advocate's purpose is merely to help the accused understand the charges and in the preparation and presentation of his or her defense. *See* WIS. ADM. CODE § DOC 303.78(2). The advocate's responsibilities do not rise to the level of counsel's duties or permit the inmate to challenge the adequacy of the advocate's assistance under the standards applicable to effective assistance of counsel.

Nothing in the record indicates that Rich's advocate failed to adequately fulfill his duties in this case. He interviewed the three staff witnesses requested by Rich and introduced a statement from Melcher corroborating Rich's testimony. He did not violate Rich's rights when he also stated that "if you are scheduled to be at work at 9:15, you are to show up at 9:15," nor when he stated that it was up to the officer in charge, rather than the inmate, to decide if enough workers were present. Rich himself admitted that he was late for work, an admission which was relied on by the disciplinary committee in finding that he violated WIS. ADM. CODE § DOC 303.49, requiring punctuality. The advocate's statement was merely a common sense acknowledgement that punctuality and attendance were required, and cannot be deemed to have impaired Rich's rights. Because the fairness of the proceeding was not affected by the statement, it provides no basis for relief. *See* WIS. ADM. CODE § DOC 303.87.

Rich's next argument is that he was denied a fair and impartial hearing because Judy Faust, one of the members of the disciplinary committee,

[2] Because Ivy and Marshall had no relevant testimony to offer and because Melcher's statement was presented and was cumulative to Rich's testimony, the issue of whether they were available or unavailable to testify at the time of the hearing was irrelevant. *See* WIS. ADM. CODE § DOC 303.81(4).

was a witness to the incident which led to the charges. However, Rich never raised this issue at the hearing, and thus no record was created establishing the truth of Rich's allegation. Because Rich failed to object to Faust's participation at the disciplinary hearing, his objection was waived and will not be considered on appeal. *See* ***Saenz v. Murphy***, 162 Wis.2d 54, 62-63, 469 N.W.2d 611, 615 (1991), *overruled on other grounds by* ***Casteel v. Vaade***, 167 Wis.2d 1, 481 N.W.2d 476 (1992).

Rich also challenges the sufficiency of the evidence to support the findings of guilt. The test on review by certiorari is the substantial evidence test, under which we determine whether reasonable minds could arrive at the same conclusion the committee reached. *See* ***Whiting***, 158 Wis.2d at 233, 461 N.W.2d at 819. That test is satisfied here as to three of the four findings of guilt.

As already noted, Rich admitted that he was late for work on August 30, 1995. Substantial evidence therefore supports the finding of a violation of WIS. ADM. CODE § DOC 303.49. His admission that he was late for work and the complaining officer's report that he was not at his work assignment on August 30, 1995, also constitute sufficient evidence to support the finding that he violated WIS. ADM. CODE § DOC 303.62, which provides that any inmate whose work fails to meet the standards set for performance on a job and who has the ability to meet those standards is guilty of an offense. While Rich contends that he did not have a history of tardiness and that his general work performance was good, the evidence regarding his failure to appear on August 30, 1995 was sufficient to support a finding that on that date his work performance was inadequate.

Evidence also supported the finding that Rich was guilty of disobeying an order. While the complaining officer did not testify at the hearing, his conduct report was introduced into the record. The conduct report was properly considered by the disciplinary committee in rendering its decision. *See* ***Culbert v. Young***, 834 F.2d 624, 631 (7th Cir. 1987); WIS. ADM. CODE § DOC 303.76(5) and (6).[3] It clearly supported a finding that Rich did not

[3] Rich has no claim arising from the complaining officer's failure to testify at the hearing because he was not one of the witnesses requested by Rich and therefore was not required to appear. *See* WIS. ADM. CODE § DOC 303.81(1).

comply with the order to leave the food service area when it was first given, and had to be told several times before complying. The fact that he eventually complied did not obviate evidence that a violation had already occurred when he stopped to talk to another inmate, objected to the order, and failed to comply with the order when first given.

The only finding that is not supported by substantial evidence in the record is the finding that Rich violated WIS. ADM. CODE § DOC 303.511. It is undisputed that Rich entered an unassigned area. However, WIS. ADM. CODE § DOC 303.511 expressly provides that a violation occurs when an inmate intentionally enters or remains in an unassigned area "*without a staff member's permission*" (emphasis added). In addition, as contended by Rich, WIS. ADM. CODE § DOC 303.05(5) provides that an inmate may disobey a rule if he or she is expressly authorized to disobey it by a staff member.[4]

It was undisputed in this case that Rich cut through a unit to which he was not assigned. However, he testified at the hearing that Melcher gave him permission to cut through the unit to meet a truck. Although his request for Melcher's appearance was denied, a statement from Melcher was introduced at the hearing in which he stated that he "did allow inmate to cut through."

The evidence that Rich cut through the unit with the permission of Melcher constitutes the only evidence in the record on the subject. The disciplinary committee did not find this evidence to be incredible. However, it found Rich guilty based on a determination that he was aware that crossing through another unit was not allowed even with staff permission.

[4] The attorney general's brief addresses this particular issue in a somewhat summary fashion, arguing simply that Rich failed to prove this defense to the satisfaction of the disciplinary committee. The brief does not discuss the applicable administrative rules in any meaningful way or cite evidence supporting the committee's finding of a violation. While we acknowledge how difficult it can be to make a cogent response to some pro se briefs, when, as here, the pro se appellant sets forth articulate issues, the State owes a duty to this court and to the appellant to respond in kind.

The defect in the committee's determination is that WIS. ADM. CODE § DOC 303.511, by its express terms, is violated only when an inmate intentionally enters or remains in an unassigned area without a staff member's permission. Because nothing in the record supports a finding that Rich entered an unassigned area without permission, the finding that he violated WIS. ADM. CODE § DOC 303.511 must be set aside.[5]

Rich also claims that the disciplinary committee failed to adequately set forth the reasons for its findings of guilt and the penalty imposed. However, in its decision, the committee stated that it relied upon the statements in the conduct report and Rich's admissions that he was aware of what time he should have been at work and was late. In a section labelled "Reason for Decision," it found that the statements in the conduct report were more credible than Rich's remaining testimony and that he was given several orders to leave the work unit before he complied.

These explanations adequately set forth the reasons for the committee's findings that Rich violated WIS. ADM. CODE §§ DOC 303.24, 303.49 and 303.62. Consequently, those findings will not be disturbed. However, based upon our determination that the record does not contain substantial evidence that Rich violated WIS. ADM. CODE § DOC 303.511, this single finding of guilt is vacated. The matter is remanded with instructions to the disciplinary committee to reconsider the penalties imposed by it based on findings of guilt as to only the other three charges. The committee must exercise its discretion to determine whether the same penalties remain appropriate or whether they should be modified based on the setting aside of one of the findings.[6]

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[5] Pursuant to WIS. ADM. CODE § DOC 303.63(1)(d), each institution may make specific substantive disciplinary policies and procedures relating to movement within the institution. Violations of such policies or procedures constitute an offense under WIS. ADM. CODE § DOC 303.63(2).

It is possible that Racine Correctional Institution rules provide that no one can enter an unassigned area under any circumstances, even with staff permission. However, there is nothing in the record on the subject, and, in any event, Rich was found guilty of violating WIS. ADM. CODE § DOC 303.511, not § DOC 303.63(2).

[6] Were it not for reversing one finding of guilt, we would have rejected Rich's argument that the

By the Court.—Order affirmed in part; reversed in part and cause remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

(..continued)
disciplinary committee failed to adequately set forth the reasons for the penalty imposed. The committee delineated the specific sentencing considerations it relied upon under WIS. ADM. CODE § DOC 303.83, and expressly based the penalty on a determination that Rich needed to be held accountable for his actions. These explanations adequately set forth the committee's reasons for the disposition.